IN THE SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1943

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No. [redacted] 44

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WILBUR V. KEEGAN, GERHARD WILHELM KUNZE, AUGUST KLAPPROTT, GUSTAV ELMER, HERMANN SCHWINN, HERMAN AGNE, JOSEPH BACHMAIER, JOSEF BELOHLAVEK, CARL FREDERICK BERG, WALTER BORCHERS, OTTO BREGLER, ERNEST MARTIN CHRISTOPH, OTTO FENTZKE, JOHN C. FITTING, BRUNO KNUPFER, WILLIAM C. KUNZ, WILLIAM OTTERSBACH, MAX RAPP, LOUIS SCHATZ, WALTER SCHNELLER, JR., HUGO WEISS, KARL RICHARD WENDLANDT, OTTO WILLUMEIT, FRITZ STREUER,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No.

WILBUR V. KEEGAN, GERHARD WILHELM KUNZE, AUGUST KLAPPROTT, GUSTAV ELMER, HERMANN SCHWINN, HERMAN AGNE, JOSEPH BACHMAIER, JOSEF BELOHLAVEK, CARL FREDERICK BERG, WALTER BORCHERS, OTTO BREGLER, ERNEST MARTIN CHRISTOPH, OTTO FENTZKE, JOHN C. FITTING, BRUNO KNUPFER, WILLIAM C. KUNZ, WILLIAM OTTERSBACH, MAX RAPP, LOUIS SCHATZ, WALTER SCHNELLER, JR., HUGO WEISS, KARL RICHARD WENDLANDT, OTTO WILLUMEIT, FRITZ STREUER,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Gerhard Wilhelm Kunze, August Klapprott, Gustav Elmer, Hermann Schwinn, Herman

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Agne, Joseph Bachmaier, Josef Belohlavek, Carl Frederick Berg, Walter Borchers, Otto Bregler, Ernest Martin Christoph, Otto Fentzke, John C. Fitting, Bruno Knupfer, William C. Kunz, William Ottersbach, Max Rapp, Louis Schatz, Walter Schneller, Jr., Hugo Weiss, Karl Richard Wendlandt, Otto Willumeit and Fritz Streuer, respectfully pray for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment of that Court, entered March 17, 1944, affirming judgments of the United States Southern District Court of New York, entered October 21, 1942, convicting your petitioners of the alleged crime of conspiring to counsel divers persons to evade, resist and refuse service in the land and naval forces of the United States in alleged violation of Section 11 of the Selective Training and Service Act of 1940 (50 U.S.C.A. §311) and the regulations promulgated thereunder.

SUMMARY STATEMENT OF MATTER INVOLVED

District Court Proceedings

Indictment 112-336, charging violation of Section 11 of the Selective Training and Service Act of 1940 (50 U.S.C.A. §311), was returned in the United States Southern District Court of New York on July 7, 1942 against all of the

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petitioners above named except Agne and Streuer. Each of the petitioners above named against whom indictment 112-336 was returned pleaded not guilty to that indictment when they were arraigned on July 9, 1942. A further indictment, 112-486, charging the same crime as indictment 112-336, was returned on August 26, 1942 against the petitioners Agne and Streuer who thereafter pleaded not guilty to the latter indictment.

The two indictments were consolidated and tried before Alfred D. Barksdale, U.S.D.J., and a jury, commencing on September 17, 1942. At the close of the Government's case, motions for a directed verdict were made on behalf of all defendants and all such motions were denied (R. 1688).* On October 19, 1942 the jury acquitted the defendant Ferdinand Callsen (R. 2070) and convicted all petitioners (R. 2069-71). Motions to set aside the verdict were made on behalf of all petitioners and all were denied (R. 2072, 2076, 2079-81). On October 21, 1942 all petitioners were sentenced "to serve a term in such penal institution as the Attorney General may direct for a period of five years" (R. 2142-43).

Circuit Court of Appeals Proceedings

A notice of appeal to the United States Circuit

*All Citations to the record are to pages of the stenographic transcript thereof, as certified to this Court.

Court of Appeals for the Second Circuit, signed by all petitioners, was filed on October 23, 1942. This notice of appeal set forth twelve grounds of appeal. An order signed by Judge Learned Hand and Judge Swan on February 8, 1943 provided that the printing of the record on appeal should be dispensed with; that the appeal should be heard upon the stenographer's minutes and "upon the relevant papers (or copies thereof) on file in the office of the Clerk of the District Court"; and that such exhibits as counsel deemed necessary in connection with the argument of the appeal should be submitted in their original form for consideration by the Circuit Court of Appeals. An order signed by Judge Learned Hand on March 12, 1943 provided that the stenographic transcript of the trial record, including all exceptions therein noted by petitioners' counsel, should constitute the Bill of Exceptions and Assignments of Error. A stipulation entered into between the United States Attorney and counsel for petitioners, approved by Judge Learned Hand and Judge Leibell on April 15, 1943, certified the correctness of the transcript of the testimony and the exhibits. The appeal was argued before the Circuit Court of Appeals (Augustus N. Hand, Chase and Clark, Circuit Judges) on November 15 and 16, 1943. On February 29, 1944 the decision by the Circuit Court of Ap-

peals was rendered affirming all judgments of conviction as against all petitioners.*

Indictment

Since the indictment returned on August 26, 1942 is identical with the indictment returned on July 7, 1942, except for the names of the defendants against whom the respective indictments were directed, the two will be treated as one. The indictment is set forth as pages 1-8 in Volume 1 of the record on appeal which has been certified to this Court, immediately preceding the stenographic transcript of the testimony.

This indictment charges that from January 1, 1940 to the date of the indictment the defendants conspired to counsel divers persons to evade, resist and refuse service in the land and naval forces of the United States in violation of Section 11 of the Selective Training and Service Act of 1940 (50 U.S.C.A. §311) and the regulations promulgated thereunder.

The remainder of the indictment sets forth the various alleged acts comprising the conspiracy substantially as follows: The defendants would be members of the German-American Bund. Keegan would be its counsel. The other defendants would be either national officers, district leaders

*The opinion of the Circuit Court of Appeals is annexed as Appendix C.

or local leaders. National headquarters of the Bund would be maintained at 178 East 85th Street, New York City, where Keegan would occupy offices.

The national officers, in conference with Keegan, would prepare Bundesbefehle (Bund commands), customarily in the German language, for distribution to the local leaders who in turn, pursuant to directions from the national officers, would read or make known to persons attending the local meetings the contents of the Bundesbefehle.

On or about October 1, 1940 a certain Bundesbefehle No. 37 would be prepared at and distributed from national headquarters counseling those to whom the contents were made known to evade, resist and refuse service in the land or naval forces of the United States. Bundesbefeble No. 37 would be read or otherwise made known by the local leaders to persons attending the meetings of the local groups.

The national officers and others would prepare and distribute "The Free American", a German language newspaper, in which would be published by the national officers, Keegan and others, certain items urging German American citizens to resist, refuse and evade service in the land and naval forces of the United States.

And finally the defendants would "otherwise" urge German-American citizens to resist the provisions of the

Selective Training and Service Act of 1940 and to evade service in the land and naval forces of the United States.

Statute

Defendants were indicted for having violated Section 11 of the Selective Training and Service Act of 1940 (50 U.S.C.A. §311) which provides, so far as relevant, as follows:

> "* * * any person * * * who knowingly counsels, aids or abets another to evade registration or service in the land or naval forces * * * or conspire to do so, shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, * * *."

Also involved in this case is Section 8 (i) of the Selective Training and Service Act of 1940 (50 U.S.C.A. §308(i)) which provides as follows:

> "(i) It is the expressed policy of the Congress that whenever a vacancy is caused in the employment rolls of any business or industry by reason of induction into the service of the United States of an employee pursuant to the provisions of this Act such vacancy shall not be filled by any person who is a member of the Communist Party or the German-American Bund."

Evidence

During the month required to try this case, nearly

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1600 pages of testimony were stenographically transcribed. The Government called 66 witnesses, the majority of whom were agents of the F.B.I., and introduced approximately 400 documentary and physical exhibits into evidence. The District Court called one witness and introduced one exhibit. The defendants did not call any witnesses and did not take the witness stand themselves, they did introduce seven exhibits.

The Government, to prove its case, relied principally upon a series of statements signed by the defendants. These statements were taken by agents of the F.B.I. Most of them were signed on May 26, 1942, approximately six weeks before the first indictment was returned. Several of the statements were taken subsequent to May 26. All were taken before the defendants were arraigned.

The Government introduced a great number of physical exhibits, such as uniforms of the "O.D.", the group which ushered at formal functions and conventions of the Bund (R. 739); these consisted of numerous shirts, trousers, belts, caps, armbands, ties and boots. Fifteen pictures of Hitler were introduced. Innumerable flags, pennants and swastikas were received in evidence. Pamphlets bearing such titles as "New Germany under Hitler", "Germany and the Jewish Problem", "Hitler is Right" and "Blood Is Holy" were marked

in evidence. The trial court also admitted such things as song books, ash trays, ladies' handkerchiefs, pins, buckles, buttons. It is perfectly obvious that none of these physical exhibits had any real relevance to the crime charged in the indictment. Their admission into evidence, however, did serve to charge the atmosphere of the court room with prejudice to such an acute degree as to make it utterly impossible to accord to the defendants a fair trial.

The principal witness called by the Government was the defendant Luedtke who had pleaded not guilty on July 10, 1942 and then on July 14, after four days of conferences with the United States Attorney, pleaded guilty (R. 430). Luedtke testified at great length concerning the organization of the Bund, its personnel, its property and the manner in which it operated. The only testimony which he gave material to the crime charged, however, was to the effect that the Bund, its officers and unit leaders were, and always had been, "in favor and not opposed to compulsory military service" (R. 426); that their only reservation was that American troops should not be sent out of the territorial limits of the United States (R. 555). Congress incorporated in the Selective Training and Service Act when it was passed in September of 1940 this very reservation,

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namely, that persons inducted under the terms of the Act should not be employed beyond the limits of the Western Hemisphere (50 U.S.C.A. §303(e)).

Aside from Luedtke, agents of the F.B.I., numerous translators and stenographers, the Government called some persons who had been present at meetings of the local units to testify concerning what had been said or done concerning the Selective Training and Service Act. Not a one of these witnesses testified that any defendant had counseled anyone or others to evade, resist or refuse service in the land and naval forces of the United States. Most of them testified positively that no such advice ever had been given. At most, they testified that certain of the defendants had urged efforts to obtain repeal of the discriminatory provision contained in Section 8(i) of the Act (50 U.S.C.A. §308(i)), above set forth.

BASIS OF THIS COURT'S JURISDICTION

The jurisdiction of this Court is invoked pursuant to Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A. §347).

The judgment of the Circuit Court of Appeals sought to be reviewed was entered March 17, 1944. The within petition for certiorari was filed March 27, 1944.

QUESTIONS PRESENTED

1. Are incriminating statements, oral and written, taken by agents of the Federal Bureau of Investigation, in violation of 5 U.S.C.A. §300a, from men under arrest but before arraignment, admissible against those men when on trial, and if not admissible, does their reception in evidence prejudice other defendants on trial with them as co-conspirators? [See opinion of Circuit Court of Appeals, pp. 997-1004]

2. Did the District Court abuse its discretion, after having refused to instruct the jury not to read newspaper accounts of the trial, in denying the defendants' motion to have a juror withdrawn and a mistrial declared on the ground that prejudicial newspaper articles had appeared in the metropolitan press, the said newspaper articles having been based upon a press release issued during the trial by the Department of Justice declaring that the defendants had committed the very crime for which they were on trial? [This question

raised in briefs and argument in the Circuit Court of Appeals but not passed upon in the opinion of that Court]

3. Were the defendants accorded a fair trial in view of the great mass of physical and documentary exhibits admitted in evidence having no relevance to the issues before the court but calculated only to inflame and prejudice a jury sitting in time of war ? [This question raised in briefs and argument in the Circuit Court of Appeals but not passed upon in the opinion of that Court]

4. Did the District Court err in charging the jury that the defendants' intention to bring a test case to determine the constitutionality of Section 8(i) of the Selective Training and Service Act of 1940 was immaterial to the guilt or innocence of the defendants ? [See opinion of Circuit Court of Appeals, pp. 994-995]

5. Was the indictment sufficient in failing to

charge the only conspiracy condemned under Section 11 of the Selective Training and Service Act of 1940, viz. a conspiracy to hinder or interfere by force or violence with the administration of the Act? [See opinion of Circuit Court of Appeals, p. 993]

6. Was the indictment sufficient in charging the defendants with having conspired to counsel others to "evade, resist and refuse" service in the land and naval forces of the United States in violation of Section 11 of the Selective Training and Service Act of 1940, whereas that statute by its very terms proscribes only conspiracies to counsel others to "evade" service? [See opinion of Circuit Court of Appeals, p. 994]

7. Was the evidence sufficient to sustain the verdict of the jury as against each defendant, particularly if there be excluded the incriminating statements, taken in violation of 5 U.S.C.A. §300a while the defendants were under arrest but before arraignment, and the mass of prejudicial and inflammatory exhibits having no relevance to the issues before the Court? [See opinion of Circuit Court of Appeals, pp. 993-994]

REASONS FOR ALLOWANCE OF THE WRIT

1. The Decision By The Circuit Court of Appeals Below Is Believed To Be In Conflict With The Applicable Decisions Of This Court.

This Court in McNabb v. United States, 318 U.S. 332 (1943), and Anderson v. United States, 318 U.S. 350 (1943), reversed convictions based on incriminating statements procured by federal agents while violating the mandate of Congress which requires arresting officers immediately to take an arrested person before a committing officer (5 U.S.C.A. §300a; 18 U.S.C.A. §595).

Upon facts in the instant case in all essential respects strikingly parallel to the facts of the McNabb and Anderson cases,* the Circuit Court of Appeals refused to follow those two cases, but not without some hesitation. In its opinion, at p. 1004, the Circuit Court of Appeals frankly acknowledged doubt as to its decision on this point in the following language: "But even if we are wrong in our interpretation of the McNabb decision . . . "

2. The Decision By The Circuit Court of Appeals Below Is Believed To Be In Conflict With Other Decisions by Circuit Courts of Appeals And By The Court of Appeals For The District of Columbia On The Same Matter.

The decisions by this Court in the McNabb and Anderson cases have been expressly adhered to in the follow-

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*See Appendix A, showing parallel between facts of the instant case and facts of the McNabb, Anderson, Gros, Haupt, Hoffman and Mitchell cases on this point.

ing cases, in all of which convictions have been reversed:

(a) Gros v. United States, 136 F. (2d) 878 (C.C.A. 9th, 1943), where the defendant had been convicted of having been an agent of the German government and having failed to register as such, and also of having conspired to disclose to the German government certain information concerning this nation's national defense; his conviction had been based upon written and oral statements taken by agents of the F.B.I. while he was under arrest but before arraignment.

(b) United States v. Haupt, 136 F. (2d) 661 (C.C.A. 7th, 1943), where the defendants had been convicted of treason; the admission of an incriminating statement against one defendant was held to have incriminated all defendants; and oral statements were held equally to be condemned with written statements when taken by agents of the F.B.I. while the defendants were under arrest but before arraignment; the Circuit Court of Appeals below in the instant case (p. 1003) expressly disapproved the decision in the Haupt case.

(c) United States v. Hoffman, 137 F. (2d) 416 (C.C.A. 2nd, 1943), where the defendant had been convicted of violating Section 11 of the Selective Training and Service Act of 1940; his conviction was based on certain incriminating statements procured by agents of the F.B.I. from the defendant while he was under arrest but before he was arraigned; in the Hoffman case the Circuit Court of Appeals for the Second Circuit, which refused to follow the McNabb, Anderson and Haupt cases in the instant case on appeal to that court, held those three cases rendered inadmissible the incriminating statements taken from the defendant in the Hoffman case.

(d) Mitchell v. United States, 138 F. (2d) 426 (App. D. C., 1943), where the defendant was convicted of housebreaking and larceny; his convictions were based on a written incriminating statement taken by police officers while

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he was under arrest but before arraignment, in violation of R.S.D.C. §397 which commands arraignment "immediately, and without delay"; this Court granted certiorari in this case on January 17, 1944.

The result of the decision by the Circuit Court of Appeals in the instant case, therefore, in refusing to follow the McNabb and Anderson cases, is in conflict with decisions by the Circuit Courts of Appeals for the Seventh and Ninth Circuits and by the Court of Appeals for the District of Columbia, as well as being in conflict with a prior decision by the Circuit Court of Appeals for the Second Circuit.

Moreover, we believe that the Circuit Court of Appeals below, in holding that the District Court did not err in charging the jury that the defendants' intention to bring a test case to determine the constitutionality of Section 8(i) of the Selective Training and Service Act of 1940 was immaterial to the guilt or innocence of the defendants, has raised a conflict with the decisions by the Circuit Courts of Appeals for the Sixth and Eighth Circuits in Landen v. United States, 299 Fed. 75 (C.C.A. 6th, 1924) and Fall v. United States, 209 Fed. 547 (C.C.A. 8th, 1913). The decision by the Circuit Court of Appeals below in the instant case on the necessity of a corrupt motive in a conspiracy case is directly in conflict with the local law of

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the State of New York as found in People v. Powell, 63 N. Y. 88 (1875) and People v. Flack, 125 N. Y. 324 (1891).

3. The Decision By The Circuit Court of Appeals Below Is Believed To Have Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

The effect of the decision by the Circuit Court of Appeals below (p. 1003), in construing 5 U.S.C.A. §300a (which directs that "the person arrested shall be immediately taken before a committing officer") to be identical with 18 U.S.C.A. §595 (which does not command immediate arraignment), is to read out of the statute relating to the conduct of agents of the F.B.I. the requirement of immediate arraignment. The decision by the Circuit Court of Appeals below (p. 1003) proposes to substitute the words "with all convenient speed" for the word "immediately" now found in the statute. To permit agents of the F.B.I. to present arrested persons for arraignment at the "convenience" of the arresting agents is to leave wide open the possibilities of "secret interrogation of persons accused of crime" and "resort to those reprehensible practices known as the 'third degree'" which this Court sought to check in its decision in the McNabb case by insisting rigorously upon the requirement of immediate arraignment which Congress deemed advisable to

include in the statute. We believe that the question of interpretation of an Act of Congress, raised by the decision of the Circuit Court of Appeals below, should be settled by this Court, although, with all deference, we had supposed this question had been settled beyond dispute by the unambiguous language of this Court in the McNabb case.

4. The Decision By The Circuit Court of Appeals Below Has Sanctioned A Departure By The District Court So Far From The Accepted And Usual Course of Judicial Proceedings As To Call For An Exercise Of This Court's Power of Supervision.

In reversing the convictions in the McNabb case based on incriminating statements procured by federal agents while the arrested men were in custody and before any order of commitment was made, this Court rested its decision upon the supervisory power of the Supreme Court over the administration of criminal justice in the federal courts (318 U.S. 332, 340). In the light of the decision by the Circuit Court of Appeals below which surely restricts and in large measure nullifies the standard of conduct established by plain and unmistakable language in the McNabb case, we invoke this Court's supervisory power to reaffirm in the instant case the standard established in the McNabb case.

This Court suggested in the McNabb case a pre-

liminary hearing by the District Court for the purpose of determining whether incriminating statements were obtained in violation of the mandate of Congress directing immediate arraignment. There was no such preliminary hearing in the instant case. Indeed, under the standard of "convenient" arraignment as distinguished from "immediate" arraignment adopted by the Circuit Court of Appeals below, a preliminary hearing to determine the admissibility of incriminating statements would be a mockery, for the only issue to be determined would be whether the defendant had been arraigned with that degree of speed consistent with convenience to the arresting agents of the F.B.I. Certainly this was not the standard of conduct nor the issue to be determined at a preliminary hearing which this Court contemplated in its decision in the McNabb case.

The circumstances under which the statement of the defendant Kunze was obtained in the instant case--circumstances sanctioned by the Circuit Court of Appeals--well illustrate the danger of substituting for the requirement of "immediate" arraignment the requirement of arraignment "with all convenient speed" proposed by the court below. Kunze was first taken into custody in Mexico sometime prior to July 4, 1942 at the direction of the F.B.I. (R.1586).

He was transferred, still under arrest, to an agent of the F.B.I. in Texas on July 4, and taken by airplane to New York City where he arrived at 8:15 A.M. on Sunday, July 5 (R. 1587). Although he had slept only occasionally during his airplane trip, to the knowledge of one of the F.B.I. agents who questioned him (R. 1590), he nevertheless was questioned, under arrest and confined to a cell, from 11 A.M. on July 5 until 5 A.M. on July 6, at which time he signed the incriminating statement later admitted in evidence against him (R. 1587, 1590). Thereafter, the following day, i.e. July 7, he was arraigned on the indictment under which he later was tried (R. 1589). Kunze therefore was under arrest for a period of four or five days before he was arraigned. The Circuit Court of Appeals below excused this delay in part on the ground that "to expect arraignment on the Fourth of July, or Sunday, would require a promptitude that we do not regard as contemplated by the statutes." We respectfully submit that the statute not only contemplated but commanded precisely such promptitude. In the City of New York, as well as in every hamlet and city throughout the land, committing officers are available twenty-four hours every day throughout the year, including holidays and Sundays, for the very purpose of determining whether arrested men are properly detained. This is precisely the function of United

States commissioners, available in every federal district in the country. To have held Kunze upwards of ninety-six hours without arraignment was utterly inexcusable, as well as contrary to both the letter and the purpose of the statute commanding immediate arraignment.

Undoubtedly one of the fundamental purposes underlying the statute, which this Court had in mind in enunciating the McNabb decision, was to assure to an arrested man the advice by a committing magistrate (not by an investigating or arresting officer) that the arrested man need not submit to questioning nor sign a statement unless he desires to and that he not only is entitled to but should be strongly urged to obtain counsel. The distinction between such advice given by a judicial officer on the one hand and an arresting officer on the other hand, is of course great. The decision by the Circuit Court of Appeals below, in proposing a standard of arraignment "with all convenient speed", would operate effectually to preclude timely judicial advice to an arrested man. Zealous arresting officers would not be human if they found it convenient to arraign a prisoner before obtaining a statement from him.

The decision below (pp. 998, 1003) moreover appears to rest at least in part upon what is believed to be the voluntary character of the statements in question,

despite the express rejection of the test of voluntariness by this Court in the McNabb decision (318 U.S. 332, 340).

The foregoing are some of the considerations which we believe warrant this Court in exercising its power of supervision over the administration of criminal justice in the federal courts in respect to the serious departure sanctioned by the Circuit Court of Appeals below from the standard of conduct established by this Court in the McNabb case.

Moreover, we believe that the Circuit Court of Appeals below, in condoning the District Court's abuse of discretion in denying the defendants' motion to have a juror withdrawn and a mistrial declared in view of the prejudicial press release issued during the trial by the Department of Justice declaring that the defendants had committed the very crime for which they were on trial, has sanctioned a departure by the District Court so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Convictions have been reversed or mistrials declared under similar circumstances. Griffin v. United States, 295 Fed. 437 (C.C.A. 3rd, 1924), Harrison v. United States, 200 Fed. 662 (C.C.A. 6th, 1912); United States v. Montgomery, 42 Fed. (2d) 254 (S.D.N.Y., 1930) and Meyer v. Cadwalader, 49 Fed. 32 (C.C.E.D. Pa., 1891).

Likewise we believe this Court should exercise its power of supervision over the administration of criminal justice in the Federal Courts by calling a halt to the practice, which was resorted to in the instant case and which has become common in the District Courts, of admitting into evidence a great mass of physical and documentary exhibits which have no relevance to the issues before the Court but are calculated only to inflame and prejudice a jury sitting in time of war. Voluminous evidence of this character was introduced at the trial of Anthony Cramer for treason in the United States Southern District Court of New York and was expressly approved by the Circuit Court of Appeals for the Second Circuit in United States v. Cramer, 137 F. (2d) 888, 897 (C.C.A. 2nd, 1943). This Court granted certiorari in the Cramer case on November 8, 1943 and the case was argued in this Court on March 9, 1944.

PRAYER

For the reasons above outlined, developed more in detail in the accompanying brief, your petitioners pray that a writ of certiorari issue out of this Court to the United States Circuit Court of Appeals for the Second Circuit and that the duly certified copy of the transcript of the proceedings below which accompanied the petition

herein shall be treated as though filed in response to the aforesaid writ, to the end that this cause may be reviewed and determined by this Court, that the final order and judgment of the Circuit Court of Appeals may be reversed, and that the petitioners may be granted such other and further relief as this Court may deem proper.

Dated, New York City, March 27, 1944.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No.

WILBUR V. KEEGAN, GERHARD WILHELM KUNZE, AUGUST KLAPPROTT, GUSTAV ELMER, HERMANN SCHWINN, HERMAN AGNE, JOSEPH BACHMAIER, JOSEF BELOHLAVEK, CARL FREDERICK BERG, WALTER BORCHERS, OTTO BREGLER, ERNEST MARTIN CHRISTOPH, OTTO FENTZKE, JOHN C. FITTING, BRUNO KNUPFER, WILLIAM C. KUNZ, WILLIAM OTTERSBACH, MAX RAPP, LOUIS SCHATZ, WALTER SCHNELLER, JR., HUGO WEISS, KARL RICHARD WENDLANDT, OTTO WILLUMEIT, FRITZ STREUER,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Second Circuit has not been officially reported. It is annexed to the certified transcript of the record filed herein, and also is annexed hereto as Appendix C.

No opinion was rendered by the United States Southern District Court of New York.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A. §347).

The judgment of the Circuit Court of Appeals sought to be reviewed was entered March 17, 1944. The within petition for certiorari was filed March 27, 1944.

STATEMENT OF THE CASE

A summary statement of the matter involved herein is set forth in the petition for certiorari at pages 2-10, supra. A summary of the argument is set forth in the index.

STATUTES INVOLVED

Sections 8(i) and 11 of the Selective Training and Service Act of 1940 (50 U.S.C.A. §§308(i), 311) are above set forth, so far as relevant to the issues of this case, in the petition (p. 7, supra).

Those statutory provisions requiring immediate arraignment by arresting officers (18 U.S.C.A. §595;

5 U.S.C.A. §300a) are set forth at pp. 31-32, infra.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred

1. In holding that incriminating statements, oral and written, taken by agents of the Federal Bureau of Investigation, in violation of 5 U.S.C.A. §300a, from men under arrest but before arraignment, were admissible against those men when on trial, and that in any event, their reception into evidence did not prejudice other defendants on trial with them as co-conspirators.

2. In condoning the abuse of discretion by the District Court, after having refused to instruct the jury not to read newspaper accounts of the trial, in denying the defendants' motion to have a juror withdrawn and a mistrial declared on the ground that prejudicial newspaper articles had appeared in the metropolitan press, the said newspaper articles having been based upon a press release issued during the trial by the Department of Justice declaring that the defendants had committed the very crime for which they were on trial.

3. In condoning the District Court's admission into evidence of a great mass of physical and documentary

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exhibits having no relevance to the issues before the Court, calculated only to inflame and prejudice a jury sitting in time of war.

4. In holding that the District Court did not err in charging the jury that the defendants' intention to bring a test case to determine the constitutionality of Section 8(i) of the Selective Training and Service Act of 1940 was immaterial to the guilt or innocence of the defendants.

5. In holding that the indictment was sufficient although it failed to charge the only conspiracy condemned in Section 11 of the Selective Training and Service Act of 1940, viz., a conspiracy to hinder or interfere by force or violence with the administration of the Act.

6. In holding that the indictment was sufficient although it charged the defendants with having conspired to counsel others to "evade, resist and refuse" service in the land and naval forces of the United States in violation of Section 11 of the Selective Training and Service Act of 1940, whereas that statute by its very terms proscribes only conspiracies to counsel others to "evade" service.

7. In holding that there was sufficient evidence to sustain the verdict of the jury as against each defendant, particularly if there be excluded the incriminating state-

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ments taken in violation of 5 U.S.C.A. §300a while the defendants were under arrest but before arraignment, and the mass of prejudicial and inflammatory exhibits having no relevance to the issues before the Court.

ARGUMENT

POINT I

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT INCRIMINATING STATEMENTS, ORAL AND WRITTEN, TAKEN BY AGENTS OF THE FEDERAL BUREAU OF INVESTIGATION IN VIOLATION OF 5 U.S.C.A. §300a FROM MEN UNDER ARREST BUT BEFORE ARRAIGNMENT, WERE ADMISSIBLE AGAINST THOSE MEN WHEN ON TRIAL, AND THAT IN ANY EVENT THEIR RECEPTION INTO EVIDENCE DID NOT PREJUDICE OTHER DEFENDANTS ON TRIAL WITH THEM AS CO-CONSPIRATORS.

The spearhead of the Government's case against the defendants was a series of eighteen incriminating statements signed by certain of the defendants* and admitted into

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*The defendants whose statements were admitted into evidence and the exhibit numbers by which each were designated are as follows: Bachmaier, Exhibit 299; Belohlavek, Exhibit 260; Berg, Exhibit 187(a); Borchers, Exhibits 183 and 184; Callsen, Exhibit 203; Christoph, Exhibit 298; Fentzke, Exhibit 355; Fitting, Exhibit 202; Knupfer, Exhibit 151; Kunz, Exhibit 354; Kunze, Exhibit 358; Ottersbach, Exhibit 356; Schatz, Exhibit 242; Weiss, Exhibit 204; Wendlandt, Exhibits 309, 330 and 331. While we believe that all of these statements were obtained under circumstances which made them inadmissible as evidence against the defendants (see United States v. Haupt, infra, at pp. 666-667), we have selected those by Kunze and Wendlandt as best illustrating the error committed by the trial court in admitting these statements.

evidence by the District Court. Aside from these incriminating statements, the Government relied principally upon the testimony of the defendant Luedtke who had pleaded guilty and then testified for the Government. On cross-examination, however, the usefulness of Luedtke as a witness for the Government was largely nullified (R.418-489; 547-560).

We believe that on the authority of two decisions rendered by this Court on March 1, 1943 reversing convictions based on written incriminating statements procured by continuous questioning of wrongly imprisoned men, the Circuit Court of Appeals below should have reversed the convictions of all the defendants because of the admission into evidence particularly of two statements by the defendants Kunze and Wendlandt.

The two decisions to which we refer as authorities are: McNabb v. United States, 318 U.S. 332 (1943) and Anderson v. United States, 318 U.S. 350 (1943). These decisions subsequently have been followed by the Circuit Courts of Appeals for the Ninth, Seventh and Second Circuits, respectively, in Gros v. United States, 136 F. (2d) 878 (C.C.A. 9th, 1943), United States v. Haupt, 136 F. (2d) 661 (C.C.A. 7th, 1943) and United States v. Hoffman, 137 F. (2d) 416 (C.C.A. 2nd, 1943), and by the Court of Appeals for the District of Columbia in Mitchell v. United States, 138 F. (2d)

426 (App. D.C. 1943), certiorari granted January 17, 1944. The Circuit Court of Appeals below (pp. 997-1004) refused to follow the McNabb and Anderson cases and expressed disapproval (p. 1003) of the Haupt case. To our knowledge, no other Circuit Court of Appeals has refused to follow the McNabb and Anderson cases.

The statements of Kunze and Wendlandt were inadmissible for the reason that they were taken by agents of the F.B.I. while these agents were violating the mandate of Congress which requires arresting officers immediately to take the person arrested before a committing officer. The basic provision of the Criminal Code violated by the agents of the F.B.I. is set forth in 18 U.S.C.A. §595 (1894) as follows:

> "It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest United States commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial***"

Even more explicit is the mandate of Congress directed particularly at the F.B.I. in respect to the requirement of an immediate arraignment following arrest, as set forth in 5 U.S.C.A. §300a (1934):

> "The Director, Assistant Directors, agents, and inspectors of the Federal Bureau of Investi-

> gation of the Department of Justice are empowered * * * to make arrests * * * but the person arrested shall be immediately taken before a committing officer * * * ". (Underscoring added)

The statements of Kunze and Wendlandt, taken by agents of the F.B.I. while Kunze and Wendlandt were under arrest but before arraignment, were therefore taken by arresting officers in violation of the statutory provisions above set forth. Under the authorities cited, the statements were inadmissible and convictions based on such illegal evidence should be reversed.

(A) Kunze's Statement of July 6, 1942 (Exhibit 358)

The circumstances under which the F.B.I. procured the written statement of the defendant Gerhard Wilhelm Kunze on July 6, 1942 disclose a particularly flagrant violation of 18 U.S.C.A. §595 and 5 U.S.C.A. §300a as set forth above.

Kunze arrived at La Guardia Airport at 8:15 A.M. on July 5 in the custody of two F.B.I. agents (R. 1587), having been in the custody of Mexican officials on July 4 (R. 1588). Upon his arrival at La Guardia Airport, Kunze was released into the custody of two other F.B.I. agents who took him to the New York office of the F.B.I., fingerprinted him, photographed him, booked him and locked him in a cell (R. 1587). One of the F.B.I. agents who then began to question

Kunze knew that he had slept only occasionally during his airplane trip from Mexico (R. 1590). Nevertheless while under arrest and confined to a cell he was questioned from 11 A.M. on July 5 until 5 A.M. on July 6, at which time he signed the statement admitted into evidence as Exhibit 358 (R. 1587, 1590). Thereafter, the following day, July 7, he was arraigned (R. 1589).

At least three F.B.I. agents were present during the questioning of Kunze and when he signed the statement (R. 1590). At no time during this period of imprisonment prior to his signing the statement was any relative or friend permitted to see him. He had no lawyer present. Indeed there is no evidence that he requested the assistance of counsel or that he was told he was entitled to counsel. It is true that he was informed that he did not have to make any statement unless he so desired; that if he did make a statement it might be used against him in court; and that he would be promised no immunity or remuneration (R. 1575). There is no evidence that Kunze was threatened or coerced in any way or that rudeness of manner was resorted to in questioning him.

The statement of the defendant Kunze which was admitted in evidence could hardly have been more incrimina-

ting, inflammatory and prejudicial to the rights of every defendant on trial. By incriminating, we mean not in the narrow sense of confessing the crime charged, but in the broader sense that Kunze's statement was the most effectual single weapon utilized by the Government in obtaining the convictions of all the defendants. He stated that he left the United States on November 8, 1941 for the dual purpose of renouncing his American citizenship and enlisting in the German Army, and that "If the war were confined to American Japanese hostilities, my sentiments would be favorable to Japan to the extent that a nation of one hundred million people needs a certain amount of room in which to live, unless it is to be condemned to a voluntary suicide." The defendant Kunze who made this statement was the national leader of the Bund, the man with whom the Government claimed all the defendants were in close association and with whom the Government sought to prove the other defendants had conspired to violate the Selective Service Act. Assertions made by the defendant Kunze in Exhibit 358, by the very design of the Government's case, certainly incriminated all the defendants on trial, as well as Kunze, before the jury.

The admission of this statement into evidence was objected to by counsel for the defendant Kunze and this ob-

jection was deemed by the court as extending to all defendants (R. 1574). The incriminating effect of this statement upon all defendants on trial is beyond dispute, notwithstanding the court's instruction to the jury "that the statement which will now be read to you applies only and should be considered by you only in your consideration of the charges against the defendant Kunze, who made the statement". This instruction by the court did not cure the incriminating effect of the statement upon the other defendants on trial. It has been squarely so held in Anderson v. United States, supra, at p. 356, and in United States v. Haupt, supra, at p. 666.

(B) Wendlandt's Statement of July 8, 1942. (Exhibit 331)

The written statement of the defendant Karl Richard Wendlandt which was marked Exhibit 331 was taken on July 8, 1942 while Wendlandt was under arrest and confined to the Erie County jail in Buffalo, New York (R. 1380). He had been arrested the previous afternoon (R. 1362). The record does not show that Wendlandt was taken before a United States commissioner or a judge prior to the taking of this statement, although he had been imprisoned for a day before the statement was signed.

The statement itself, although in its most incriminating aspects couched in the negative, is highly inflammatory and prejudicial to all the defendants. After first alluding to his use of alias names, it then proceeds to give assur-

ance that Wendlandt has "never entered into any subversive activities against the United States" and that he "never at anytime entered into espionage or sabotage of any kind." The power of suggestion often surpasses the influence of direct assertion. It would be difficult indeed to conceive of statements more cruelly calculated than these to poison the minds of a jury sitting in a Federal court in wartime. Just the fact that Wendlandt would be asked by an agent of the F.B.I. about possible subversive activities or possible crimes of espionage and sabotage was highly incriminating and intensely prejudicial to Wendlandt, as well as to all the defendants, before the jury.

Wendlandt was advised by the F.B.I. agent who took his statement that he was entitled to have an attorney if he desired one; that he need not make the statement or sign it if he did not wish to, and that the statement might be used against him in court (R. 1381). There is no evidence that any force or threat of force was exerted against Wendlandt in procuring this statement, on the contrary, so far as is disclosed by the testimony of the F.B.I. agent who in his own handwriting composed and wrote out the statement signed by Wendlandt, the statement was given and subscribed to voluntarily (R. 1381). Nevertheless, he was confined to a jail while this statement was being given, as well as prior thereto, and saw neither friend nor relative nor counsel, so far

as the record shows.

For the reason that this statement, Exhibit 331, was procured by the agents of the F.B.I. prior to their taking Wendlandt before a United States commissioner or a judicial officer in order to determine the sufficiency of the justification for their detention of him, as required by 18 U.S.C.A. §595 (1894) and 5 U.S.C.A. §300a (1934), the statement was obtained while Wendlandt was wrongly imprisoned and therefore was inadmissable as evidence. Over the objection of counsel for the defendants, however, the statement was received in evidence by the trial judge (R. 1382).

Although the jury was instructed that "the statement is admitted for your consideration in the case against the defendant Wendlandt only" (R. 1382), it is perfectly patent that this incriminating statement implicated all the defendants, as well as Wendlandt. The convictions of all the defendants, including Wendlandt, therefore should be reversed. Anderson v. United States, supra, at p. 356; United States v. Haupt, supra, at p. 666.

Equally inadmissible as the written statement signed by Wendlandt on July 8, 1942, were the oral statements made by him to the F.B.I. agent at or about the time the written statement was taken, to the effect that Bund Command No. 37 was either passed around or read aloud at one of the meetings of the local unit of the Bund in Buffalo and at that

time the Bund Command was also discussed at a meeting (R. 1384). Since these oral incriminating statements were made by Wendlandt after he was imprisoned and before he was arraigned, they also were inadmissible. United States v. Haupt, supra, at p. 667; Gros v. United States, supra, at pp. 881-882; Mitchell v. United States, supra, at pp. 426-427.

In the recital which follows of the facts concerning the incriminating statements admitted in the McNabb, Anderson, Gros, Haupt, Hoffman and Mitchell cases (in all of which cases convictions were reversed because of the admission of the incriminating statements), there will be seen a close parallel between the facts of those cases and the facts of the instant case on appeal.

(C) McNabb v. United States, 318 U.S. 332 (1943).

In this case five members of the McNabb family were indicted for second-degree murder of an officer of the Alcohol Tax Unit of the Bureau of Internal Revenue in the mountains near Chattanooga, Tennessee (p. 333).* They were tried and three of them were convicted in the District Court for the Eastern District of Tennessee. The Circuit Court of Appeals for the Sixth Circuit affirmed the convictions (p. 333). On

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* All references to opinions of the United States Supreme Court are to pages in the Official Reports.

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appeal to the Supreme Court, however, these convictions were reversed solely for the reason that the convictions were based in part upon incriminating statements (p. 345) obtained under the following circumstances.

The officer of the Alcohol Tax Unit was killed at 10 P.M. on July 31, 1940 (p. 334). Between 1 and 2 A.M. on August 1st, three of the McNabbs were arrested (p. 334); a fourth was arrested by the local police and turned over to the Federal authorities at 10 A.M. on August 1st (p. 335); and the fifth voluntarily surrendered at 9 A.M. on August 2nd (p. 337). No one of the McNabbs was taken before a United States commissioner or a judge (pp. 334, 337, 344), although they were taken directly to the Federal building in Chattanooga (pp. 334, 335, 338). Over a period of 48 hours (p. 345), however, and while under detention (p. 345), these men were questioned by agents of the Alcohol Tax Unit who succeeded in obtaining from the three who were convicted incriminating admissions which later were received in evidence at the trial (p. 333). These statements were objected to by the defendants at the trial only on the ground that they were obtained through coercion (p. 349). Both court and jury determined the statements had been voluntarily given (p. 349). The two defendants who made no incriminating admissions were acquitted at the direction of the trial court (p. 338).

None of the defendants took the witness stand before the jury (p. 349).

During the course of the questioning by the Federal officers, the arrested men saw neither relative nor friend nor lawyer (pp. 335, 336, 345). There is no evidence that they requested the assistance of counsel or that they were told they were entitled to counsel (pp. 335, 336, 345). At least six officers were present during most of the questioning (p. 336). The arrested men were advised that they did not have to make a statement unless they desired to; that they need not answer any questions asked unless they wished to; that any statement made by them would be used against them; and that they need not fear any use of force (p. 336). There is no evidence that the arrested men were threatened by the officers in any manner (p. 337).

In this Court the defendants who had been convicted urged that the admission of the incriminating statements at the trial constituted a violation of that clause in the Fifth Amendment which provides that no person "shall be compelled in any criminal case to be a witness against himself" (p. 339). The Government argued that the clause of the Fifth Amendment

invoked by the defendants made inadmissible only involuntary admissions, and since the incriminating statements of the defendants had been voluntarily given, such statements had been admitted properly by the trial court (p. 339).

In reversing the judgments of conviction, however, this Court, in an opinion by Mr. Justice Frankfurter, rested its decision, not upon the Constitutional test of "voluntariness" which had been urged, but upon the supervisory power of this Court over the administration of criminal justice in the federal courts (p. 340). Condemning the judicial function assumed by the arresting officers in departing from their role as investigators by procuring statements from the defendants before they were arraigned, this Court pointed out that the agents of the F.B.I. had violated those acts of Congress set forth above at p. 31 of this brief (pp. 341-342). The purpose behind the mandate of Congress which the arresting officers violated in the course of obtaining the incriminating statements from the defendants was then vigorously stated by this Court. And finally, in applying the procedural requirement of the statute to the detention of the defendants in the case at bar and concluding that the

conviction based on statements obtained while the men were wrongly imprisoned could not stand, the Court stated (pp. 344-345):

> "The circumstances in which the statements admitted in evidence against the petitioners were secured reveal a plain disregard of the duty enjoined by Congress upon federal law officers. Freeman and Raymond McNabb were arrested in the middle of the night at their home. Instead of being brought before a United States commissioner or a judicial officer, as the law requires, in order to determine the sufficiency of the justification for their detention, they were put in a barren cell and kept there for fourteen hours. For two days they were subjected to unremitting questioning by numerous officers. Benjamin's confession was secured by detaining him unlawfully and questioning him continuously for five or six hours. The McNabbs had to submit to all this without the aid of friends or the benefit of counsel. The record leaves no room for doubt that the questioning of the petitioners took place while they were in the custody of the arresting officers and before any order of commitment was made. Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law. Congress has not explicitly forbidden the use of evidence so procured. But to permit such evidence to be made the basis of a conviction in the federal courts would stultify the policy which Congress has enacted into law." (Underscoring added)

The similarity between the facts of the McNabb case and the facts of the instant case is striking. The crucial point is that the incriminating statements of the defendants Kunze and Wendlandt and the questioning leading up to those statements took place while Kunze and Wendlandt were in the custody of the arresting officers and before any order of commitment was made. Convictions based on statements procured under such circumstances cannot stand.

(D) Anderson v. United States, 318 U.S. 350 (1943)

Here some twenty-one striking miners were indicted in the District Court for the Eastern District of Tennessee for conspiring to dynamite certain power lines and steel towers owned by the T.V.A. in Polk County, Tennessee (p. 352). Of those indicted, eight were convicted (p. 351). The Circuit Court of Appeals for the Sixth Circuit affirmed the convictions (p. 351).

Against six of the defendants who were convicted there had been admitted at the trial certain incriminating statements (p. 353). The Government's case was based principally upon these statements, together with the testimony of an informant whose credibility was under severe attack (p. 356). The statements were obtained by agents of the F.B.I. over a period of six days during which the men were held in custody at a Y.M.C.A. by the Sheriff of Polk County and his deputies (p. 353). The arrested men were not taken before any magistrate or other committing officer as required by a Tennessee statute (p. 352) similar to the provisions of 18 U.S.C.A. §595 (1894) and 5 U.S.C.A. §300a (1934), as set forth above at p. 31 of this brief, until after they had been questioned and their statements had been obtained by the F.B.I. (p. 356). During this period of detention, the defendants saw neither friend nor relative nor counsel (pp. 353, 356).

In reversing the judgments of conviction of all eight defendants solely for the reason that the incriminating state-

ments which were admitted against six of the defendants at the trial had been procured in violation of a Tennessee statute which prohibited a person's detention until after examination by a magistrate, this Court held that the inadmissibility of such statements was not cured by the fact that the F.B.I. agents who actually took the statements were not formally guilty of the illegal detention of the arrested men; the working arrangement between the F.B.I. and the Sheriff of Polk County which resulted in the procurement of the incriminating statements while the men were wrongly imprisoned was tantamount to unlawful detention of the men by the F.B.I. while the statements were being taken (p. 356).

From the standpoint of the instant case, the decision of this Court in the Anderson case is of significance chiefly because the inadmissibility of the incriminating statements in the latter case caused the reversal of the convictions, not only of the six defendants who had made the statements, but of two other defendants who had not given statements. In this regard, this Court, speaking through Mr. Justice Frankfurter, said (pp. 356-357):

> "The Government urges that, even if the confessions are held to be inadmissible, only the convictions of the six petitioners who confessed should be reversed. The prosecution rested principally on these confessions and the testimony of an informant, Freed Long, whose credibility was under severe attack. The incriminating statement of each petitioner implicated all the others, including those who did not confess. * * * There is no reason to believe, therefore, that confessions which came

before the jury as an organic tissue of proof can be severed and given distributive significance by holding that they had a major share in the conviction of some of the petitioners and none at all as to the others. Since it was error to admit these confessions, we see no escape from the conclusion that the convictions of all the petitioners must be set aside." (Underscoring added)

On the authority of the Anderson case, we believe that the convictions, not only of the defendants Kunze and Wendlandt, but of all the petitioners should be reversed.

(E) Gros v. United States, 136 F.(2d) 878 (C.C.A.9th, 1943)

The defendant in this case was indicted and convicted in the District Court for the Southern District of California on a charge of having been an agent of the German government and failing to register as such, and also of having conspired to disclose to the German government certain information concerning this nation's national defense (p. 879).*

The convictions were based in part upon a written incriminating statement admitted in evidence against the defendant (p. 879). This statement was obtained by agents of the F.B.I. after five days of questioning and after the defendant had been confined for a week in a cell in the F.B.I.

*All references to opinions of the Circuit Courts of Appeals are to pages in either the bound volumes or advance sheets of the Federal Reporter, Second Seri

field office in Los Angeles (p. 880). During this period of imprisonment, the arrested man was not taken before a committing officer (p. 880) as required by 18 U.S.C.A. §595 (1894) and 5 U.S.C.A. §300a (1934), set forth above at p. 31 of this brief.

While illegally detained, the defendant sometimes was taken out of his cell to the F.B.I. office for questioning or to a restaurant for meals (p. 880). No bodily harm was inflicted upon him and he was not treated rudely during the questioning (p. 880). Originally arrested after waiving service of a warrant of arrest for violation of the Selective Training and Service Act, the defendant saw neither friend nor counsel during the period he was held in custody by the F.B.I. (p. 880).

The trial in this case took place before the decisions by this Court in the McNabb and Anderson cases, supra, were rendered (p. 880). No objection in the trial court was made by the defendant to the admissibility of his incriminating statement on the ground that it had been obtained by the F.B.I. while he was wrongly under arrest (p. 880). The admissibility of the statement was not even urged as error by the defendant in his brief on appeal (p. 880). The Circuit Court of Appeals for the Ninth Circuit, nevertheless, on its own motion noticed the error committed by the trial court in admitting the incriminating statement and reversed the convictions on the authority of the McNabb and Anderson

cases (p. 881).

In a concurring opinion, Circuit Judge Stephens noted that oral statements made by an illegally detained person to the arresting officers are likewise inadmissible under the rule in the McNabb case (pp. 881-882):

> "In my concurrence, I wish to point out that the document signed by appellant is not the only evidence received in the case which comes under the ban of McNabb v. United States, 318 U.S. 332, 63 S. Ct. 608, 87 L. Ed. -.
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> The officers who kept guard over the appellant during his restraint engaged him in running conversation, and these officers testified to the admissions made during those conversations. In fact the typewritten-signed document termed the confession is but a narrative form of these very admissions. It is apparent that such conversations are the very source of the confession and therefore must be as objectionable as the confession itself. This is not to be confused with admissions made by accused persons at the time of legal arrest or with admissions or confessions made thereafter in the absence of coercion."

Upon the authority of the Gros case, we believe that the oral statements made by the defendant Wendlandt to an agent of the F.B.I. while under illegal detention were as erroneously admitted as the written statement signed by him on July 8, 1942 (See pp. 37-38 of this brief above).

(F) United States v. Haupt, 136 F.(2d) 661 (C.C.A. 7th, 1943)

Six defendants, three men and their respective wives, were indicted, tried and convicted on a charge of treason in this case (p. 663). The alleged treason con-

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sisted of giving aid and comfort to a saboteur, Herbert Haupt, who was tried before a military tribunal, found guilty and executed on August 9, 1942 (p. 663). Herbert Haupt was the son of two of the defendants in this case (p. 663). Three of the six defendants, the men, were sentenced to death (p. 663). The three women defendants were sentenced each to twenty-five years' imprisonment and each to pay a fine of $10,000 (p. 663). The convictions of all six defendants were unanimously reversed by the Circuit Court of Appeals for the Seventh Circuit (p. 676).

The Circuit Court of Appeals reversed for the reason, among others, that certain incriminating statements by five of the defendants which had been obtained while the defendants were wrongly imprisoned in violation of 18 U.S.C.A. §595 (1894) and 5 U.S.C.A. §300a (1934) had been admitted in evidence (p. 668). Admission of these statements alone required reversal (p. 671).

Fourteen statements by five of the six defendants were received in evidence at the trial (p. 665). All statements were taken by agents of the F.B.I. (p. 665). Some were taken at the homes of the defendants, some at the F.B.I. offices and some at the village jail in Winnetka, Illinois (pp. 666-667). The defendants were not under arrest at all times when they were being questioned nor at all times when their statements were being taken (pp. 666-667), but each defendant at one time or another was taken into custody by the F.B.I. agents (p. 665). The record does not show when the defendants, or any of them, were taken before a United States

commissioner or committing officer, but it is certain that none was arraigned until after the statements were obtained (p. 665). The contents of the incriminating statements being of a highly prejudicial character, if their admission into evidence was improper, reversal of the judgments of conviction would be required (p. 666).

On appeal the defendants contended that the convictions should be reversed in the light of the McNabb and Anderson cases (p. 666). The Government contended that those two cases were inapplicable to the case at bar for the reason that in the latter the defendants freely and voluntarily executed written waivers of custody, thus waiving the right to be taken before a committing officer (p. 666). The Circuit Court of Appeals rejected the Government's contention in respect to the asserted waiver by the defendants, holding that the Government had failed to sustain its burden of proving that the waivers had been voluntarily given, and moreover that the duty imposed by statute upon an arresting officer immediately to take an arrested person before a committing officer could not be waived (p. 671). In connection with the state of the record on the question of the waivers, the Circuit Court of Appeals took the occasion to point out that the test of the admissibility of the statements set forth in the McNabb and Anderson cases was not squarely before the trial court -- a situation similar to that in the instant case (pp. 668-669).

Ruling that the admission of an incriminating statement against one defendant incriminated all, the Circuit Court of Appeals stated (p. 666):

> "Not only were they incriminating as to the defendant who made the statement, but also as to other defendants, although the jury was told by the court, both at the time of their admission and in its charge to the jury, that they were to be considered only against the defendant making the statement or confession."

Moreover the decision of the Circuit Court of Appeals embraced within its condemnation of the improperly admitted statements, oral as well as the written statements (p. 667):

> "In addition to the written statements admitted in evidence a number of agents testified as to oral statements made by the defendants after they had been taken into custody."

In conclusion the Circuit Court of Appeals indicated that, although it personally disapproved of the decisions by this Court in the McNabb and Anderson cases, it nevertheless felt compelled to follow those decisions (p. 671):

> "With all due deference to the Supreme Court, and especially to Mr. Justice Felix Frankfurter, the author of those opinions, we are constrained to state that we entertain grave doubts that this recently promulgated rule of evidence will result in any improvement to the administration of criminal justice. * * * The Supreme Court, however, has clearly spoken and we must accept its pronouncement."

(G) United States v. Hoffman, 137 F. (2d) 416 (C. C. A. 2nd, 1943)

The defendant here was charged with having "unlawfully, wilfully and knowingly" violated Section 11 of the Selective Training and Service Act of 1940 (50 U.S.C.A. §311). He was tried and convicted in the United States Eastern District Court of New York. The Circuit Court of Appeals for the Second Circuit reversed the conviction, and in reversing, pointed out that the District Court had erroneously admitted in evidence certain incriminating statements procured by agents of the F. B. I. from the defendant while he was under arrest but before he was arraigned and that such statements were not admissible against the defendant under the McNabb, Anderson, and Haupt cases (pp. 420-421).

The defendant was arrested on December 23, 1942 by agents of the F. B. I. He was taken to the federal building in Brooklyn and questioned by the government prosecutor, at which time he signed a statement witnessed by an agent of the F. B. I. Thereafter, he gave further statements, on December 24 and December 26, in both instances at the Federal House of Detention in New York City. The record was not clear as to whether the statements were given prior or subsequent to arraignment. Under such a state of the record, the Circuit Court of Appeals presumed

they were given prior to arraignment; a similar presumption was invoked in the Haupt case (p. 665). Contrary to its position taken in the instant case in attributing considerable weight to the alleged voluntary character of the statements involved (pp. 998, 1003), the Circuit Court of Appeals in the Hoffman case clearly recognized that "even the voluntary character of statements prior to arraignment does not make them admissible" (p. 421). Moreover, the statements involved in the Hoffman case were not direct confessions of the crime charged in the sense of being conclusive as to the defendant's guilt; like the Kunze and Wendlandt statements in the instant case, they were incriminating in that they reflected an attitude toward military service against Germany and her allies which could not fail to arouse intense emotions and prejudice on the part of the jury (p. 421).

No explanation was offered by the Circuit Court of Appeals below for the conflict between its attitude toward incriminating statements obtained from men under arrest and before arraignment in the instant case and its attitude on the same issue in the Hoffman case. There was no showing whatever of arraignment "with all convenient speed" in the Hoffman case; on the contrary, the defendant there appears to have been held in custody for approximately four days before he was arraigned -- substantially the

same period of illegal detention as with Kunze in the instant case.

(H) Mitchell v. United States, 138 F. (2d) 426 (App. D. C. 1943).

The defendant in this case was indicted and convicted in the United States District Court for the District of Columbia on charges of housebreaking and larceny. His conviction was based upon stolen property seized in his home and upon oral confessions. Consent to seize the stolen property in question was said to have been given by the defendant to the arresting officers immediately after his arrest and as part of his confessions. The latter were asserted by the Government to have been given freely, voluntarily and without compulsion or inducement of any sort; the defendant denied having given the consent to search or having made the confessions. This issue was resolved by the District Court against the defendant and the evidence, including the confessions, was admitted.

The Court of Appeals for the District of Columbia, however, reversed on the ground that the defendant, after having been arrested, was held at the police station for more than a week before he was arraigned. The interrogation leading up to the alleged confessions and consent

appears to have taken place at the police station while the defendant was under arrest but before he was arraigned. In relying upon the McNabb case, the Court of Appeals characterized that case in the following language which appears to set forth well the basic principle underlying the decision in the McNabb case (p. 427):

> "This unambiguous language leaves us no alternative but to apply the same rule with the same results to the facts in the present case. That this new rule, as Mr. Justice Reed calls it in his dissent, introduces a far-reaching innovation in the established rules of evidence in criminal cases will hardly be questioned, for heretofore the test of admissibility has been thought to be limited to the question -- was the confession free and voluntary. Likewise, that its universal application in the Federal Courts will, in some cases -- as it may in this -- result in a miscarriage of justice is obvious. But doubtless this contingency was fully considered by the Supreme Court, and the conclusion deliberately reached that this -- in the cases in which it occurs -- will prove a lesser evil than the perpetuation by court approval of a violation by police of statutes designed to protect the personal rights of the individual and preserve his immunity from abuse and from imprisonment except upon a judgment of his peers and the law of the land."

This Court on January 17, 1944 granted certiorari in the Mitchell case and on February 28, 1944 denied a motion to enlarge the record.

(I) Decision By the Circuit Court of Appeals Below on this Point.

We believe that the decision below in the instant

case, which refused to follow the McNabb and Anderson cases in this Court, expressly disapproved the Haupt case in the Circuit Court of Appeals for the Seventh Circuit and squarely conflicts with the Gros, Hoffman and Mitchell cases, in the Ninth and Second Circuit Courts of Appeals and the Court of Appeals for the District of Columbia, respectively, is open to the following fundamental criticism, briefly summarized:

1. The proposed substitution of the words "with all convenient speed" for the word "immediate" in reference to the arraignment required by 5 U.S.C.A. §300a is contrary to both the letter of the statute and to the fundamental purpose thereof as enunciated by this Court in the McNabb case. (See pp. 17-21, supra).

2. The advice to which a man is entitled when arrested, that he need not give a statement unless he desires to and that he is entitled to representation by counsel when making the statement, is advice which should be given by a committing magistrate, not by an arresting officer; under the standard of "convenient" rather than immediate arraignment adopted by the court below, such advice prior to the procurement of a statement from the

arrested man is effectually precluded. (See p. 21, supra).

3. To the extent that the decision below rests upon the alleged voluntary character of the statements involved (pp. 998, 1003), it is contrary to the McNabb case (p. 340). (See pp. 21-22, supra).

4. The excuse advanced by the court below for condoning the delay in arraigning Kunze, that "to expect arraignment on the Fourth of July, or Sunday would require a promptitude that we do not regard as contemplated by the statutes" is to ignore the command of immediate arraignment in the statute, as well as to overlook the very purpose for which United States commissioners and other committing magistrates are readily available 24 hours every day in the year, including holidays and Sundays, especially in the City of New York. (See pp. 20-21, supra).

5. The attempted justification of the Kunze statement in evidence on the ground that it did not incriminate Kunze in the narrow sense of confessing the crime charged wholly ignores the crucial fact that this statement, full of inflammatory statements of the most prejudicial character, was the most deadly single weapon utilized by the prosecution in its case against the defendants, introduced as the

climax of the Government's case; indeed it was far more incriminating in the eyes of the jury than any direct confession of the crime charged could possibly have been. (See pp. 33-35, supra).

6. The conclusion reached by the court below that the statements in question could not have prejudiced any defendants other than Kunze and Wendlandt in any event represents an unrealistic view in the light of the very design of the Government's case whereby all defendants were closely associated as co-conspirators, especially with Kunze as national leader (See. p. 34, supra) and ignores completely the direct holdings of the Anderson case (p. 356) and the Haupt case (p. 666) where such incriminating statements have been expressly held to incriminate all defendants on trial, despite the instructions by the trial court that such statements apply only to the defendants who made them. (See p. 35, supra).

7. The dismissal as unsubstantial by the court below (p. 1004) of the admission of the oral statements given by Wendlandt to an agent of the F. B. I. while Wendlandt was confined in the Erie County jail in Buffalo on July 8, 1942 (R. 1362, 1380) without

having been arraigned is perhaps the most glaring error in the entire opinion, particularly since those statements constituted a direct confession of the crime charged and had been specifically excluded at Wendlandt's request from the written statements signed by him on that day; the decision by the court below is in direct contravention with the Haupt case (p. 667), the Gros case (pp. 881-882) and the Mitchell case (pp. 426, 427), on this point. (See pp. 37-38, supra).

(J) Summary Under This Point

1. By the mandate of Congress, federal officers who make arrests, and agents of the F. B. I. in particular, are directed to take the person arrested before a committing officer, immediately.

2. Statements, oral or written, made by an arrested person while being detained in violation of the aforementioned mandate of Congress, are inadmissible in evidence.

3. On the authority of the decisions by this Court in the McNabb and Anderson cases, convictions will be reversed when based on written or oral incriminating statements procured by arresting officers in violation of

the statute requiring immediate arraignment.

4. The statements given by the defendants Kunze and Wendlandt on July 6, 1942 and July 8, 1942, were procured by agents of the F.B.I. while the defendants were under arrest and before they were taken before a committing officer.

5. The admission into evidence over the objection of counsel for the defendants of the aforementioned statements of the defendants Kunze and Wendlandt, therefore, constituted reversible error, even though the statements may have been voluntarily given.

6. The admission of the statements by Kunze and Wendlandt into evidence incriminated all the defendants on trial. The convictions of all petitioners accordingly should be reversed.

7. The decision by the Circuit Court of Appeals below not only is contrary to the decisions of this Court and in conflict with decisions of other Circuit Courts of Appeals and the Court of Appeals for the District of Columbia, but gives sanction to the abridgement of rights of an arrested man which this Court

has unambiguously stated must be protected in accordance with the clear mandate of Congress.

POINT II

THE PETITIONERS DID NOT RECEIVE A FAIR TRIAL.

In affirming the convictions in this case the Circuit Court of Appeals said (p. 1005) that "During the whole trial the judge exercised scrupulous care and dealt with complex questions of law and fact with intelligence and fairness. In a situation where passions might run high he maintained the highest traditions of the bench". The Circuit Court of Appeals made this statement despite the fact that it ignored completely in its opinion the defendants' motion to withdraw a juror and to declare a mistrial (R. 977-978), which motion was based upon the issuance by the Department of Justice of a prejudicial press release during the course of the trial. The Circuit Court of Appeals also ignored the fact that numerous prejudicial and inflammatory exhibits were admitted in evidence which had absolutely no tendency to prove the crime charged.

(A) The Inflammatory Press Release Issued by the Department of Justice.

At the outset of the trial defense counsel moved

that the jury be instructed not to read newspaper accounts of the case (R. 35). The trial judge denied this motion but cautioned the jury "not to let anything you read in the newspapers or anywhere else influence your trial and decision of this case in any way" (R.35-36).

Two weeks after the beginning of the trial the Department of Justice, which must be presumed to have known of this ruling, issued a press release calculated to arouse the passions of the American people including the jurors in this case, against the defendants on trial. It is difficult to conceive of a more prejudicial statement. The full text of this release is annexed to this Brief as Appendix B.

The release stated that the drive to denaturalize former leaders or officials of the German American Bund was being undertaken as evidence showed that "in the last decade, particularly, the Bund has been an arm of an aggressive Nazi world diplomacy -- an instrument of the 'German Auslands organization' with headquarters at Stuttgart.... We are moving at once to clean out this source of danger to our national security". The press release then made statements concerning the history of the Bund and quoted many statements of persons not defendants in this case. It was stated that "as in the Nazi party in Germany, the pride of the German American Bund was its disciplined and uniformed band of 'storm troopers'. This was to be the nucleus of

the striking force of the moment when 'Der Tag' came". Numerous other inflammatory statements were made in the release and it was then stated that "as the national crisis deepened, Bund officials openly advocated defiance or evasion of certain laws which they felt might prove inimical to their purposes." The release then quoted the very portion of the Bund order for which the petitioners were on trial.

The New York newspapers printed articles based upon this release (Defendants' Exhibit I for identification). The petitioners immediately moved to have a juror withdrawn and to have a mistrial declared. The trial court denied this motion but did admonish the jurors not to be influenced by newspaper articles (R. 977-980).

We recognize that the trial court must exercise its discretion in determining whether or not the petitioners were prejudiced by these newspaper articles. Van Riper v. United States, 13 F. (2d) 961 (C.C.A. 2nd, 1926), cert. denied Ackerson v. United States, 273 U. S. 702 (1926); Langer v. United States, 76 F. (2d) 817 (C.C.A. 8th, 1935); Rossi v. United States, 278 Fed. 349 (C.C.A. 9th, 1922). The point raised here, however, is entirely different from the ordinary situation in which overzealous newspaper reporters write articles. Here the

Department of Justice furnished the material upon which the newspaper articles were based. An almost identical situation was before the court in Meyer v. Cadwalader, 49 Fed. 32 (C.C. E.D. Pa. 1891). In that case the newspaper article was an interview of a Treasury agent who participated in the trial and the article discussed the merits of the case. The Treasury agent stated that "I am only too glad to give my views, as I think that the people should know all the facts in this attempt to loot the United States Treasury". The court granted a new trial in that case and said that the "jury separated at the end of each session of the court, and it is incredible that, going out into the community, they did not see and read these newspaper publications".

The prejudicial nature of the press release and the fact that it was issued by the Department of Justice were sufficient grounds for the defendants' motion to withdraw a juror and fully warranted a reversal by the Circuit Court of Appeals below. Harrison v. United States, 200 Fed. 662 (C.C.A. 6th, 1912); Griffin v. United States, 295 Fed. 437 (C. C. A. 3rd, 1924); United States v. Montgomery, et al., 42 F. (2d) 254 (S.D. N.Y. 1930). The action of the Depart-

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ment of Justice, when the jury had been told, in effect, to read the newspapers, seriously prejudiced the petitioners and the denial of their motion constituted a clear abuse of discretion.

(B) The Prejudicial and Inflammatory Exhibits

The trial of this case was characterized by the admission of numerous prejudicial and inflammatory exhibits having no tendency to prove the crime charged. The admission of this evidence created a hostile atmosphere, inflamed the minds of the jurors and denied the petitioners a fair and impartial trial.

During the course of the trial fifteen pictures of Hitler were admitted.* Numerous exhibits, such as song books (Ex. 211), Nazi party programs (Ex. 180), pamphlets (Ex. 190, 235), ash trays bearing swastikas (Ex. 250), and photographs of various Nazi leaders (Ex. 329) were introduced. In addition, the Government offered and the trial court admitted numerous exhibits showing the uniforms worn by the OD group of the Bund (Exs. 19, 20, 21, 22, 23), many flags of the German American Bund (Exs. 17, 240, 241, 247, 325) and flags containing swastikas were placed before the jury (Exs. 172, 173, 248, 326). In all, sixty-five of the exhibits introduced have no conceivable purpose other than to poison the minds of the jurors against the defendants. The Bund emblem was

*Government Exhibits 159, 160, 161, 162, 215, 222, 258, 259, 301, 322, 333, 334, 335, 348 and 349.

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a raised swastika similar to the emblem of the Third Reich. The case was tried at a time when this country was at war with the Third Reich and the effect was hopelessly to inflame the minds of the jurors and prejudice them against the petitioners.

It is difficult to recreate for this Court the atmosphere of the trial. The Bund flags and uniforms were unfurled constantly and hardly a day passed without some of the inflammatory exhibits being brandished before the jury. In the setting of war the Government deliberately aroused the passions of the jurors and took from the petitioners the fair trial to which they were entitled. Voluminous evidence of a similar character was introduced at the trial of Anthony Cramer for treason in the United States Southern District Court of New York and was expressly approved by the Circuit Court of Appeals for the Second Circuit in United States v. Cramer, 137 F. (2d) 888, 897 (C.C.A. 2nd, 1943). This Court granted certiorari in the Cramer case on November 8, 1943 and the case was argued in this Court on March 9, 1944.

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POINT III

THE CIRCUIT COURT OF APPEALS ERRED IN APPROVING THE DISTRICT COURT'S CHARGE TO THE JURY THAT THE DEFENDANTS' INTENTION TO BRING A TEST CASE TO DETERMINE THE CONSTITUTIONALITY OF SECTION 8(i) OF THE SELECTIVE TRAINING AND SERVICE ACT OF 1940 WAS IMMATERIAL TO THE GUILT OR INNOCENCE OF THE DEFENDANTS.

Under the statute (50 U.S.C.A. §311) anyone who "knowingly counsels, aids or abets another to evade registration or service in the land or naval forces * * * or conspire to do so" shall be guilty of a crime. In order to make out a prima facie case of conspiracy under this statute, the Government was required to show beyond a reasonable doubt that the defendants had an unlawful or corrupt intent to conspire to counsel someone to evade service in the armed forces. Landen v. United States, 299 Fed. 75, 78 (C.C.A. 6th, 1924); Fall v. United States, 209 Fed. 547 (C.C.A. 8th, 1913); People v. Powell, 63 N.Y. 88 (1875).

The District Court charged the jury that an intention on the part of the defendants to bring a test case to determine the constitutionality of Section 8(i) of the Selective Training and Service Act was immaterial to the guilt or innocence of the defendants; he charged that a "bona fide honest intent to make a test case was no defense"

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(R. 2054-2060, 2089, 2139). The trial court thus erroneously withdrew from the jury the question of the corrupt intent of the defendants.

In this case the defendants did not intend to counsel evasion of the statute, but only to make a test case. Every witness who testified concerning the discrimination inherent in Section 8(i) of the Selective Training and Service Act testified that it was the desire of the national leaders to make a test case (R.154, 217, 468-469). The evidence shows that one of the defendants asked the counsel of the Bund at an open meeting if Paragraph 4 of Bund Order No. 37 was legal (R. 781; Exhibit 184). This question indicates clearly that the defendants had no intention to do anything which was unlawful.

The evidence shows that the counsel for the Bund repeatedly told defendants that they had the right to go to court to test this statute (R. 463). This reliance upon the advice of counsel is clear and convincing proof of the fact that the defendants lacked the necessary criminal intent and only intended to do an act innocent in itself. Williamson v. United States, 207 U.S. 425, 453 (1908); Miller v. United States, 277 Fed. 721, 726 (C.C.A. 4th, 1921).

In this case the evidence fails to show that the defendants had any unlawful or corrupt intention to conspire to counsel others to evade the Selective Training and Service Act. Since they in good faith and honesty relied upon the advice of counsel and since the end sought was not inherently unlawful the criminal intent necessary to make out a prima facie case cannot be inferred from the facts.

The Circuit Court of Appeals below in affirming the convictions said (p. 995):

> "We hold that to establish violation of the statute nothing more has to be proved than that the parties 'had in contemplation all the elements of the crime they are charged with conspiracy to commit'. United States v. Mack, 112 F. (2d) 290, 292 (C.C.A. 2); Hamburg-American Steam Packet Co. v. United States, 250 Fed. 747, 759 (C.C.A. 2); Chadwick v. United States, 141 Fed. 225, 243 (C.C.A. 3)."

The cases cited are all cases wherein the ends sought to be accomplished or the means used are malum in se. In this case the end sought and the means used were not inherently wrongful and the question of corrupt intent should have been submitted to the jury.

POINT IV

THE INDICTMENT WAS NOT SUFFICIENT

(A) Failure to Charge the Only Conspiracy Condemned Under Section 11 of the Act, viz. A Conspiracy to Hinder or Interfere by Force or Violence With the Administration of the Act.

The defendants moved to dismiss the indictment (R. 22-24) upon the ground that Section 11 of the Selective Training and Service Act does not make it a crime to conspire to counsel others to evade the Act. Following the decision by the Circuit Court of Appeals for the Second Circuit in United States v. O'Connell, 126 F. (2d) 807 (C.C.A. 2nd, 1942), cert. den. in Houlihan v. United States, 316 U.S. 700 (1942), the trial judge overruled these motions (R. 22-24). In that case the Circuit Court of Appeals below had held that Section 11 of the Act was not restricted "to conspiracies to 'hinder or interfere in any way by force or violence with the administration of this Act'" and "the disjunctive clause 'or conspire to do so' includes conspiracies to commit all the preceding offenses." The Circuit Court of Appeals below adhered to its decision in the O'Connell case in rendering its opinion in the instant case (p. 993).

We submit that this Court should consider the

full implications of the O'Connell case. Section 11 of the Act provides:

> "(I) Any person . . . who shall knowingly fail or neglect to perform such duty, (II) and any person . . . who shall knowingly make any false . . ., muster, (III) and any person who (a) . . . thereto, (b) or who otherwise evades this Act, (c) or who knowingly counsels . . . another to evade service . . . directions, (d) or who in any manner . . . Act, (IV) or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, (V) shall, upon conviction be punished . . . " (Numbers, letters and underlining supplied.)

This section sets forth two separate and distinct thoughts. The first thought is embraced by the portions of the statute designated I to III, inclusive, while the second thought is embraced within the words covered by IV. Thus, the first thought, when broken down, in substance says: (I) "any person", (II) "and any person", (III) "and any person" shall be punished, etc. These are all singular phrases and there must be two or more persons before there can be a conspiracy.

The second separate and distinct thought expressed in the portion marked IV is introduced by the words "or any person or persons" which is typical language of conspiracy statutes. These are the only plural words

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included in any of the four subdivisions. For this reason the clause "or conspire to do so" must relate to IV and not to I, II, or III, which are all singular phrases.

In the 1917 Act there was no phrase similar to "or conspire to do so" and conspiracies to evade the Draft Act were punished under the general conspiracy statute (18 U.S.C.A. §88) which provides for imprisonment for two years. Certainly, if Congress, when enacting the new Draft Act, had intended to make sweeping changes so as to include conspiracies to "evade" the Act or to counsel others to evade the Act, it would have done so by clear and convincing language. Instead Congress merely provided that conspiracies to hinder or interfere by force or violence with the Draft Act be punished by five years imprisonment. The less heinous offense of conspiracy to do any of the other acts prohibited by the Draft Act was left by Congress to be punished under the general conspiracy statute which only provides for a maximum of two years imprisonment.

The legislative history is silent concerning these changes. If Congress had intended such sweeping changes from the 1918 Act as are embodied in the decision by the Circuit Court of Appeals for the Second Circuit in the

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O'Connell case, there certainly would have been extensive legislative discussion. Thus, the silence of the Congressional Record is convincing proof that Congress did not intend to change the Draft Act to punish conspiracies other than those to hinder or interfere by force or violence.

In the light of the foregoing facts we respectfully submit that this Court should review the effect in the instant case of the decision in United States v. O'Connell, supra.

(B) Charging the Defendants With Having Conspired to Counsel Others to "Evade, Resist and Refuse" Service in the Land and Naval Forces of the United States In Violation of Section 12 of the Act, Whereas that Statute By Its Very Terms Proscribes Only Conspiracies to Counsel Others to "Evade" Service.

The indictment charges a conspiracy "to counsel divers persons to evade, resist and refuse service in the land and naval forces of the United States" (R. 2).

The statute (50 U.S.C.A. §311), however, does not make it a crime to counsel anyone to resist and refuse service. It merely makes it a crime to counsel someone to evade service. The words "resist and refuse" are not in the statute.

The statute reads: "or who knowingly counsels, aids or abets another to evade registration or service in

the land and naval forces".

An indictment is defective where it charges a crime merely in the generic language of the statute. It must state the particulars of the crime with all of its elements.

The Circuit Court of Appeals for the Second Circuit stated in Brenner v. United States, 287 Fed. 636 (C.C.A. 2nd, 1922) at page 640:

> "The indictment must charge the offense in more than the generic terms as in the definition. It must descend to particulars. United States v. Cruikshank, 92 U.S. 542, 23 L. Ed. 588. A crime, unless otherwise provided by statute, is made up of acts and intent, and they must be set forth in the indictment with reasonable particularity as to time, place and circumstances. Such particulars are matters of substance and not of form, and their omission is not aided or cured by a verdict."

The only fact appearing in the indictment as to what the defendants did as part of the conspiracy, is the portion of the Bund Command No. 37, translation of which is quoted (R. 7):

> "Supposing the case should arise, EVERYONE who can take it upon himself will therefore REFUSE to do military service until this law and all other laws of the country or of the States, etc., which restrict the citizenship rights of BUND members ARE REPEALED!
> We shall fight this issue of oppression out as a test case."

It is plain that this Bund Command does not counsel anyone to evade military service, but, if anything, counsels outright refusal.

"Evade" and "resist or refuse" are not synonymous. These words have well defined meanings. In Cohen v. Marx Jewelry Co., 92 F. (2d) 498, 501 (App. D.C., 1937) it was said that the term "evade . . . signifies getting away from by artifice, or, avoiding, often by skill, dexterity or contrivance." Webster's International Dictionary defines "evade" as follows:

> "To get away from by artifice, to avoid by dexterity, subterfuge, address, or ingenuity; to escape from cleverly, as, to evade a blow, a pursuer, a punishment; to evade the force of an argument."

Nowhere in the indictment are any facts stated showing that the defendants did anything to conspire to counsel people to evade registration or service under the Act.

For the foregoing reasons, therefore, we submit that the decision by the Circuit Court of Appeals below in respect to the sufficiency of the indictment (pp. 993-994) should be reviewed by this Court.

POINT V

THE EVIDENCE WAS NOT SUFFICIENT TO SUSTAIN THE VERDICT OF THE JURY AS AGAINST EACH DEFENDANT.

The evidence against the petitoners failed to make out a prima facie case. The District Court, however, overruled the motions of the petitioners for directed verdicts at the close of the Government's evidence and the motions at the close of all of the evidence (R. 1688). The District Court also overruled the motions made by the defendants to set aside the verdict and for a new trial (R. 2072, 2076, 2079-81).

As to many of the defendants, the evidence merely showed that they read Bund Order No. 37 to the local units and that they did not participate in the preparation or circulation of that order. The Circuit Court of Appeals below, in stating the facts, said that Bund Order No. 37 "was sent to all the local units throughout the United States and was either read or its contents made known to the members of the respective units by all of the appellants herein who were leaders of local units, unless possibly the defendant Schneller" (p. 990). Despite the fact that the evidence showed that many of the defen-

dants did not participate in the formulation or promulgation of Order No. 37, the Circuit Court of Appeals below said that "All of the appellants, unless possibly Schneller, have already been shown to have participated in the formulation or promulgation of Order 37, which definitely advocated resistance" (p. 994).

The fact that the Government's evidence did not make out a prima facie case as against the defendants can be illustrated by the Government's case as against the defendants Agne and Schneller. One witness testified, when led, that Agne read Bund Order No. 37 to the Philadelphia unit (R. 1227), but, on cross-examination, said that it might have been read by someone else or even by the witness himself (R. 1231). The second witness against Agne testified that one night Agne introduced Kunze who said "that it would be unfair to deny German-Americans the right to work on one hand and, on the other hand, expect them to serve in the Armed Forces" and "that the Bund would take steps to correct this unfairness" (R. 1236). Agne thanked the speaker for coming and said that he hoped he had made an impression (R. 1237). The only other witness against Agne, when asked if Agne was present at a meeting at which the Selective Service Act was discussed, said, "To my recollection he must have been there, because he usually was there" (R. 1243).

The only evidence offered against Schneller was a newspaper article written by him for an Erie newspaper in the issue of October 18, 1940 (Ex. 300), and the conclusory testimony of Luedtke without any supporting detail (R. 279) that on June 14, 1941 Schneller was one of the local leaders in Erie. The newspaper article attacks the Selective Training and Service Act as a piece of class legislation in the interest of the rich. Admittedly it was written about two months before the German-American Bund ever approached Schneller about joining. It, therefore, could not have been an act in furtherance of a conspiracy operating through the German-American Bund, and that is the only conspiracy charged. It is the only conspiracy which the court instructed the jury they were to consider (R. 2050, 2051). The exhibit was objected to on the specific ground that at the time it was written Schneller admittedly was in no way connected with the Bund. The objection was overruled and the trial judge instructed the jury as follows (R. 1274):

> "I will say to the jury that this article is dated October 18, 1940, at a time when it has been alleged a conspiracy existed. If you after you hear all the evidence are satisfied beyond a reasonable doubt that the defendant Schneller <u>at that time</u> was a member of any conspiracy as alleged then you may consider the article as evidence against all parties. Unless you do from all of the evidence when you have

heard it believe that Schneller was a member of the conspiracy as alleged then I will direct you not to regard it as against anyone." (Underscoring ours)

It is clear that when the court admitted Exhibit 300 with the remarks to the jury just quoted, he expected that further testimony connecting Schneller definitely with the alleged conspiracy would be introduced by the Government. None was. The entire case against him consisted of the oral testimony of Luedtke about seeing Schneller in Erie eight months later and Exhibit 300. Under the court's instruction with regard to that exhibit quoted above, it could not properly have been considered even against Schneller himself. This is the sum total of the evidence against the defendant Schneller.

The condition of the record when the case was given to the jury was such that the only evidence against Schneller open to them was the bare conclusion of Luedtke that on June 14, 1941 (Ex. 133) Schneller was one of the group leaders in Erie. The article in the Erie newspaper (Ex. 300), and any statements with regard to Schneller made in Bachmaier's signed statement to the F. B. I. (Ex. 299) were out of the case.

As already pointed out, under the instructions of the court at the time of the admission in evidence of

Schneller's article in the Erie newspaper, this could not be considered even against Schneller unless the jury, after hearing all the evidence in the case, found that at the time of the publication of the article, October 18, 1940, he was a member of the conspiracy. The Government had shown affirmatively that the first overtures of the Bund to Erie were in December, 1940 (Exs. 127-134). There was, therefore, no basis for finding that Schneller "at that time" was a member of the conspiracy and therefore no right in the jury to consider Exhibit 300 against Schneller.

Even the admissibility of the document for any purpose was doubtful. As is pointed out in Wigmore on Evidence, 3d Ed., Vol. II, § 302, the admissibility of similar acts to prove intent depends upon the assumption that the act charged was done. Wigmore says (p. 200):

> "It will be seen that the peculiar feature of this process of proof is that the act itself is assumed to be done, -- either because (as usually) it is conceded, or because the jury are instructed not to consider the evidence * * * until they find the act to have been done and are proceeding to determine the intent." (Emphasis as in original).

Since as to Schneller there was no evidence whatsoever of any subsequent act, the intent of which it was necessary to clarify, this purpose was inapplicable. He certainly could not be convicted upon the basis of evidence

admitted to show the intent of a subsequent act when no such subsequent act is conceded or proven.

At the time of the motion to dismiss as to the defendant Schneller, the court was in considerable doubt whether the motion should not be granted (R. 1625, 1665). The court said (R. 1665):

> "I am of the opinion in passing, without arriving at a conclusion, that the publication of the article in the newspaper, about which the gentleman testified, Schneller wrote in the newspaper, that that alone is not sufficient to sustain a conviction, and I would like to hear the Government on the question of what evidence it does rely on as to that particular individual, and anything else that the Government may wish to argue."

In answer to this request of the court, the Government restated the evidence against Schneller as above set forth and added that the witness Heine (of the Philadelphia unit) had testified about the Erie unit. An examination of his testimony will disclose that only in the most general way did he refer to a remark made by Kunze about a new unit in Erie. He was unable to fix the time of the meeting but said that he remembered it was "quite cold" (R. 1246). An examination of Exhibit 128, which shows Kunze's first visit to Erie on December 4, also shows a visit to Philadelphia on December 7. This is undoubtedly the meeting to which Heine referred, but his testimony in no way mentions Schneller or supplies any defects in the proof against either of them.

The evidence against the defendants Agne and Schneller, as well as against many other defendants, was nothing more than mere suspicion that they might have been parties to a conspiracy as charged in the indictment. It is well established that mere suspicion is not sufficient. Marrash, et al. v. United States, 168 Fed. 225 (C.C.A. 2nd, 1909); Lucadamo v. United States, 280 Fed. 653 (C.C.A. 2nd, 1922); United States v. Potash, et al., 118 F. (2d) 54 (C.C.A. 2nd, 1941), cert. den. 313 U.S. 584 (1941). The rule was well stated in the Marrash case, supra, as follows(p. 231):

> "There are some suspicious circumstances and facts which seem to indicate that he had knowledge of the illegal nature of the transactions, but there is nothing which rises to the dignity of proof required in criminal causes. Knowledge by an alleged co-conspirator that the other defendants were attempting to defraud is not enough. Mere suspicion that he was a party to the conspiracy is not enough." (Underscoring added)

In view of the weakness of the evidence against many of the defendants, the admission of the incriminating statements made by Kunze and Wendlandt takes on added significance. It can be seen, furthermore, that since the evidence was extremely weak against many of the defendants, the prejudicial and inflammatory exhibits and the Department of Justice press release, all influenced the jury to return a verdict of guilty and that such a verdict was not based solely upon the evidence in the case. To imprison twenty-four men each for a five-year term on evidence, or lack of evidence, of this character, is a travesty upon justice.

CONCLUSION

For the reasons stated in the petition and in this brief, it is respectfully submitted that the application for a writ of certiorari should be granted.

For the reason that this case involved substantial questions of Federal law which should be reviewed by this Court, a writ of certiorari should be issued for that purpose as prayed in the foregoing petition.

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Respectfully submitted,

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